APPELLATE CIVIL

1908.
June 12.

Before Mr. Justice Banerji and Mr. Justice Richards.

BECHAN SINGH (DEFENDANT) *v.* KARAN SINGH (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 201—*Act No. I of* 1872 *(Indian Evidence Act), section* 4—*Evidence—Presumption—Record of plaintiff's name as a co-sharer.*

Held on a construction of section 201 of the Agra Tenancy Act, 1901, that the words "if in any suit instituted under the provisions of Chapter XI . . . . the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it" mean that, so far as the Revenue Court is concerned, such Court is bound to presume in favour of the plaintiff, and it is for the defendant "to establish by suit in the Civil Court that the plaintiff has no such proprietary right." *Dhanka* v. *Umrao Singh* (1) and *Dil Kunwar* v. *Udai Ram* (2) dissented from. The judgment of Richards, J., in *Dhanka* v. *Umrao Singh* (3) followed. *Banwari Lal* v. *Nladar* (4) explained.

THE plaintiff in this case sued as mortgagee of a 2½ biswa share in mauza Larhapur, pargana Imratpur, to recover from the defendant, the lambardar of the village, his share of profits for the years 1309, 1310 and 1311 Fasli. The plaintiff was recorded in the khewat as mortgagee. The defendant resisted the suit upon various grounds, but mainly upon the ground that the plaintiff was not, and had not been for more than 12 years before suit, in possession of the share in question, and that the defendant was in adverse proprietary possession. The Court of first instance (Assistant Collector of the first class) gave the plaintiff a decree. The defendant appealed. The District Judge dismissed the appeal, holding that, according to section 201 of the Agra Tenancy Act, 1901, the Revenue Court was bound to presume in favour of the plaintiff's title, leaving to the defendant his remedy in the Civil Court. The defendant thereupon appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

BANERJI, J.—This appeal arises in a suit for profits brought against the lambardar by the mortgagee of a recorded co-sharer. The name of the plaintiff is also recorded in the revenue papers.

*Second appeal No. 1100 of 1905 from a decree of H. W. Lyle, District Judge of Farrukhabad, dated the 1st of August 1905, confirming a decree of Avadh Behari Lal, Assistant Collector of Farrukhabad, dated the 17th of May 1905.

(1) (1907) I. L. R., 30 All., 58.
(2) (1906) I. L. R., 29 All., 148.
(3) Weekly Notes, 1907, p. 43.
(4) (1906) I. L. R., 29 All., 158.

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The claim was resisted on the ground that the plaintiff had no proprietary right and that the defendant was in adverse proprietary possession. The Court of first instance decreed the claim in part and this decree has been affirmed by the lower appellate Court. The learned Judge was of opinion that, having regard to section 201, sub-section (3), of the Agra Tenancy Act, the Court could not go behind the entry in the revenue record and was not competent to try the question of proprietary right raised on behalf of the defendant. The correctness of this decision is impugned in this appeal. Section 201 of the Agra Tenancy Act provides for suits for profits brought by two descriptions of plaintiffs : (1) those whose names are not recorded as having the proprietary right entitling them to bring the suit, and (2) those whose names are so recorded. As regards the first class of persons the section provides that the Court shall proceed in the manner directed in section 199, that is to say, it may either require the plaintiff to institute a suit in the Civil Court to establish his right or it may determine the question of title itself, constituting itself for that purpose a Civil Court, the defeated party having a right of appeal to the District Judge or the High Court as the case may be. In the case of a plaintiff whose name is recorded, the section provides that the Court shall presume that he has such right. But it further provides that in such a case a suit may be brought in the Civil Court to establish that the *plaintiff* has not such proprietary right. It is thus clear from the proviso that if the plaintiff is a person whose name is recorded in the revenue papers it is for the defendant to bring a suit in the Civil Court to have it established that the plaintiff has no such right. It seems to me that the object of the section is that when the name of the plaintiff is recorded in the revenue papers, the Court is bound to presume that he has the right to sue, and the entry of his name should be regarded as sufficient proof and the Court should not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. If the defendant can disprove the plaintiff's title in the Revenue Court and that Court can try the question of title, the proviso is superfluous. Under sections 44 and 57 of the Land Revenue Act (No. III of 1901) an entry in the revenue

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registers and in the [illegible]nts is *primâ facie* evidence of what it record[illegible]e disputing it has the right to sue in the Civil Court to establish his right. Those sections would give to the defendant all the remedy that he might be entitled to, and therefore the whole of clause (3), [illegible]ding the proviso, would be unnecessary and superfluous. Any [illegible]er view would lead to anomalies. If the plaintiff's name is not recorded, the Revenue Court has the option of not trying the question of title and may refer the plaintiff to the Civil Court. But, according to the contention of the appellant, if the name of the plaintiff is recorded, the Revenue Court has no option, but must try the question of title. Again, if the decision of that question by the Revenue Court is adverse to the plaintiff, he has under the proviso no right of suit in the Civil Court. So that the defendant has two remedies open to him, whilst the plaintiff has only one. Surely that could not have been the intention of the Legislature. It is contended that the words 'shall presume' in section 201, sub-section (3), must be read as having the same meaning which is given to those words in the Evidence Act. In my judgment that was not the intention of the Legislature, because we find that in the Tenancy Act and in the cognate Act No. III of 1901 where the Legislature intends any entry to be *primâ facie* evidence of what it records, it uses the words "until the contrary is proved." I may refer to section 108, sub-section (2) of the Tenancy Act and sections 44, 57 and 84 of the Land Revenue Act. It is true that in section 9 of the Tenancy Act, it is provided that certain entries shall be conclusive proof of a person being a permanent tenure-holder or a fixed rate tenant or not as the case may be, but it must be borne in mind that the two Acts were not drawn up with as much care and precision as they should have been. Furthermore, it seems to me that in section 201, sub-section (3), it could not be declared that the record of the plaintiff's name should for all purposes be conclusive proof of the plaintiff's title, because the proviso to that very section enables the defendant to bring a suit in the Civil Court to have the question of title tried and the correctness of the entry tested. Therefore when in sub-section (3) the Legislature provided that if the plaintiff is recorded as having the right, the Court should

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presume that he has it and shou[illegible] to the defendant to have the question of title tried in a[illegible] the object of the Legislature was clearly to declare that for the purposes of the suit in the Revenue Court the entry should be regarded as sufficient proof and the Court should not go behind it. That such was the intention would be abundantly manifest if it were permissible to us to refer to the report of the Select Committee on the Bill which afterwards became Act No. II of 1901. Apart, however, from this, the whole context of the section and the policy of the Act lead, in my opinion, to only one conclusion, namely, that the Revenue Court should not go behind the entry. In the case of a person whose name is not recorded, the Act provides that the question of his title should be tried by only one Court, namely, either by the Civil Court or the Revenue Court, which may constitute itself a Civil Court. I fail to see why in the case of a plaintiff whose name is recorded two remedies should have been given to his opponent, namely, a remedy of trial by the Revenue Court and a suit in the Civil Court. In the suit in the Civil Court the decision in the Revenue Court will be nugatory and of no value. Such certainly could not have been the intention of the Legislature. The view I have expressed above was held by my brother Richards and myself in the case of *Niaz Ali Khan* v. *Govind Ram* (F. A. f. O. No. 70 of 1904, decided on the 22nd of May 1905).* The same view was taken by my brother Richards in his dissentient judgment in the case of *Dhanka* v. *Umrao Singh* (1) and recently by Mr. Justice Karamat Husain in *Har Prasad* v. *Syed Muhammad Baqar*

*The judgment in this case was as follows :—

BANERJI and RICHARDS, JJ.—This was a suit for profits by a person who is recorded as having the proprietary right entitling him to claim profits. Under sub-section (3) of section 201 of the Tenancy Act of 1901 the Court shall presume that such a person has a proprietary right. The defendant is competent to sue in a Civil Court under the proviso to that sub-section to establish that the plaintiff has not the proprietary right claimed by him. The Court below was therefore right in remanding the case to the Court of first instance, and we dismiss this appeal with costs.

(1) Weekly Notes., 1907, p. 43.

(S. A. No. 152 of 1907, decided on the 21st of April 1908).* The opposite view was held by Mr. Justice Knox in *Dil Kunwar* v. *Udai Ram* (1) and also in his judgment in *Dhanka* v. *Umrao Singh*. In the same case it was held in appeal under the Letters Patent (2) that the presumption enjoined by section 201 is not conclusive, but may be rebutted by evidence offered to the contrary. With great respect, I am unable to agree with the decisions in the cases in which the contrary has been held. It appears to me that in those cases the considerations to which I have referred above were not given due weight. In the case last mentioned there is no reference to the proviso to section 201, on which the decision of the question entirely depends. We have been referred to the case of *Banwari Lal* v. *Niadar* (3), to

* The judgment in this case was as follows :—

KARAMAT HUSAIN, J.—This was a suit instituted by Har Prasad and others under section 165 of the Agra Tenancy Act for their share of the profits for 1311 Fasli. The allegation in the plaint was that they were co-sharers in the mahal *gulabi* to the extent of two biswas out of 9 biswas, 10 biswansis, 8 kachwansis and 12 tanwansis. One of the pleas raised in defence by the defendants was that the extent of the share the profits of which were claimed was not correct. The Court of first instance found that the correct amount of the share was 1 biswa, 18 biswansis, 1 kachwansi and 18 tanwansis and gave a decree for the profits of that share. The plaintiffs appealed to the learned District Judge of Moradabad. The first ground of appeal to that Court was that the Court of first instance should have awarded profits in respect of 2 biswas against which the appellant's names were recorded. The learned District Judge affirmed the decree of the first Court, holding that the khewat on the face of it was incorrect. The plaintiffs come here in second appeal, and it is urged on their behalf that the entry in the khewat according to the provisions of section 201, sub-section (3), of Act No. II of 1901 is conclusive. This contention in my judgment is perfectly sound. Sub-section 3, section 201 is as follows:—"If the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it." That being so, the Courts below had no power to go behind the entry in the khewat. I therefore decree the appeal, set aside the decrees of both the Courts below and remand the case under the provisions of section 562 of the Code of Civil Procedure to the Court of first instance through the Court of first appeal with directions to ascertain the amount of the profits on the basis that the plaintiffs are co-sharers of 2 biswas and to award that amount to them. Costs here and hitherto will abide the event.

(1) (1907) I. L. R., 29 All., 143. (2) (1907) I. L. R., 30 All., 58.
(3) (1907) I. L. R., 29 All., 158.

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which I was a party. In that case the District Judge had held that it was for the plaintiffs to show that they or their predecessors in title had within 12 years collected the profits. From this view we dissented, and we pointed out the provisions of section 201. No doubt in the judgment the following words occur:—"it was for the defendant to rebut the presumption the law raised in the plaintiff's favour." As regards this, I may observe that the question whether the presumption under section 201 was a rebuttable presumption or not was not discussed and this observation was only an *obiter dictum*. However, on full consideration I think it was erroneous. In my judgment the conclusion at which the Court below arrived is right. I would accordingly dismiss the appeal with costs.

RICHARDS, J.—The learned District Judge dismissed the appeal in the Court below on the ground that on the true construction of section 201, sub-section (3), of the Agra Tenancy Act, the plaintiff being recorded as having proprietary title was entitled to a decree. I entirely agree with the decision and reasons given by the learned District Judge. A difficulty, however, arises by reason of the fact that a contrary view was taken by a Bench of this Court in the case of *Dhanka* v. *Umrao Singh* (1). My learned colleague has referred to the various cases in which the construction of section 201 of the Act has been considered, and it seems to me that we are entitled, having regard to the conflict of authority, to consider the provisions of the section without feeling bound by any previous decisions. The case of *Dhanka* v. *Umrao Singh* was heard in the first instance by Knox, J. and myself. In the course of my judgment I gave at some length my reasons for holding that under the provisions of sub-section (3) of section 201 a Revenue Court could not go behind the entry in the khewat recording the plaintiff's proprietary title. The judgment is reported in the Weekly Notes, 1907, p. 43. I endeavoured to point out that if the Legislature intended that the entry should merely raise a *primâ facie* case in favour of the plaintiff, the whole sub-section was quite meaningless and superfluous. Sections 44 and 57 of the Revenue Act had already made entries of this nature *primâ facie* evidence, and it was

(1) (1907) I. L. R., 30 All., 58.

therefore entirely unnecessary to re-enact in section 201 of the Tenancy Act what was already abundantly provided for by a general section of the Revenue Act. I also pointed out how inconvenient such a construction would be having regard to the proviso to sub-section (3). I would, however, here like to correct an error in my judgment in the case. At p. 44 of the Report the following passage occurs:—'To hold otherwise necessarily involves the almost absurd result that the Revenue Court can decide the question of title against the plaintiff, and that notwithstanding such decision the same plaintiff can at once go to the Civil Court to try the same question over again." The word 'defendant' should be substituted for the word 'plaintiff' because it is quite clear that it is only the defendant who is entitled to go to the Civil Court and ask for a declaration that the plaintiff has no title. It seems to me that the very fact that it is the defendant and not the plaintiff who is entitled under the proviso to go to the Civil Court is the strongest possible argument in favour of the construction given to the section by the learned District Judge. As pointed out by my learned colleague in the course of the judgment he has just delivered, if the construction contended for by the appellant is to be given to the sub-section, the defendant is entitled to a complete trial of the question of title in the Revenue Court, and if the decision be against him he can have the same question retried in the Civil Court. Why is a plaintiff whose title is recorded not given the same right of going to the Civil Court? The answer is, I think, because, his title being recorded, the Revenue Court cannot decide the question of title against him and he has therefore no necessity to go to the Civil Court. I have not at all lost sight of the fact that the view that I take did not find favour with the Bench before whom the case of *Dhanka* v. *Umrao Singh* came in a Letters Patent Appeal. I have therefore reconsidered my judgment, and I have also very carefully considered the judgment of the Court hearing the appeal. It seems to me that the proviso to sub-section (3) altogether escaped the notice of the Court. None of the reasons I gave for arriving at the conclusion at which I did arrive are dealt with in the judgment of the Court. The learned Judges ask:—" Is there any

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grave reason for interpreting the words 'shall presume' as equivalent to the words 'shall conclusively presume'?" I think that there are grave reasons for holding that a Revenue Court, in suits instituted under the provisions of Chapter XI of the Act, should not go behind the record of the proprietary title of the plaintiff. The clear intention of the section itself is one reason which would be defeated by any other construction. The section provides the course the Court is to adopt—(1) in the case of a plaintiff who is not recorded, and (2) in the case of a plaintiff who is recorded. Sub-section (3) is without object or meaning if the Revenue Court is to go behind the entry, and renders two conflicting decisions possible. The learned Judges say:—"The question is by no means free from difficulty" and towards the end of the judgment "*on the whole* we see no reason for giving conclusiveness to a presumption where the Legislature has not in express terms done so." It seems to me that the learned Judges formed no very strong opinion contrary to the opinion that we took in the case of *Niaz Ali Khan* v. *Gobind Ram*, and which we still hold after further consideration. The decision seems to me to be based upon the definition of the words 'shall presume' in the Evidence Act. There is no similar definition in the Agra Tenancy Act. The whole object of section 201 of the latter Act and the proviso to sub-section (3) clearly show, I think, that the meaning given by express definition in the Evidence Act to the expression 'shall presume' cannot be given to the same words in section 201, sub-section (3), of the Tenancy Act. A perusal of the provisions of the Revenue Act clearly shows that it was the intention of the Legislature to make the records in the revenue registers and record of rights as accurate and as valuable as possible. Elaborate provisions are made for their preparation and correction, and it certainly is not unnatural to suppose that the Legislature intended by sub-section (3) that in a Revenue Court these records should be deemed conclusive in certain specified suits, namely, in suits instituted under the provisions of Chapter XI of the Act. The value and efficacy of these records will be much enhanced if pressure is brought to bear on persons entitled to proprietary rights to have such rights recorded. In section 108, sub-section (2), a receipt is made *primâ facie* evidence of an acquittance in full

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up to the date of the receipt. The words used are "it shall be presumed until the contrary is shown." Here we have an instance in which the same words in the same Act are qualified by the words "until the contrary is shown." Section 44 of the Land Revenue Act (passed the same day as the Tenancy Act) provides that the entries in the Annual Registers "shall be presumed to be true until the contrary is proved." Section 57 provides that all entries in Records of Rights "shall be presumed to be true until the contrary is shown." It cannot be said that where the Legislature intended the words 'shall presume' to create merely a *primâ facie* presumption it never said so. It is true that the expression 'conclusive proof' occurs in section 9. This section, however, refers to all Courts and not merely to a Revenue Court.

The point involved is one of great importance and of frequent occurrence. After full consideration I have no doubt but that the decision of the Court below was correct, and I also would dismiss the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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April 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

CHEDA LAL AND ANOTHER (DEFENDANTS) *v.* GOBIND RAM (PLAINTIFF).*

Will—Construction of document—"Money"—General personal estate.

Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeathe his "money" to two legatees, with directions as to its disposal, it was *held* that the intention of the testator being apparently, from a perusal of the whole will, to bequeathe all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. *Cadogan* v. *Palagi* (1) referred to.

THE suit out of which this appeal arose was instituted by Gobind Ram, the surviving brother of one Bhawani Das, who died on the 7th September 1898, to recover from the defendants Cheda Lal and Joti Prasad certain movable property which belonged to Bhawani Das at his death. The defendants claimed to be entitled to possession of the property in question under the

* First Appeal No. 110 of 1899 from a decree of Maula Bakhsh, Officiating Subordinate Judge of Bareilly, dated the 6th of April 1899.

(1) (1883) L. R., 25 Ch. D., 154.

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provisions of a will alleged to have been executed by the deceased on the 9th of March 1888. The plaintiff in his plaint alleged that this will was a fabricated will, and he claimed the property as the surviving member of a joint Hindu family consisting of Bhawani and himself. The Court of first instance (Subordinate Judge of Bareilly) found that the alleged will was a genuine will, but he held that upon the construction of it the property in dispute did not pass to the defendants, but was undisposed of. He also found that the plaintiff Gobind Ram and Bhawani were not members of a joint family, but were separate. The defendants appealed, urging that, on a proper construction of the will of Bhawani Das, not only money strictly so called passed to them, but all the personal estate of the testator. The terms of the will in dispute, so far as they are material, are set forth in the judgment.

Mr. *R. Malcomson*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This suit was instituted by Gobind Ram, the surviving brother of one Bhawani Das, who died on the 7th September 1898, to recover from the defendants Cheda Lal and Joti Prasad certain movable property which belonged to Bhawani Das at his death. The defendants claim to be entitled to possession of the property in question under the provisions of a will alleged to have been executed by the deceased on the 9th of March 1888. The plaintiff in his plaint alleged that this will was a fabricated will, and he claimed the property as the surviving member of a joint Hindu family consisting of Bhawani and himself. The learned Subordinate Judge found that the alleged will was a genuine will, but he held that upon the construction of it the property in dispute did not pass to the defendants, but was undisposed of. He also found that the plaintiff Gob nd Ram and Bhawani were not members of a joint family, but were separate. The will contains the following provisions. After a recital that his nephews, Ram Chandar and Dina Nath the sons of Gobind Ram, were separate from him ; that they had always been troubling him, and that there was an ill-feeling between them and him, and a recital that according to Hindu Law these nephews would inherit his estate after his death,

the testator thereby excluded them from inheriting his estate and "did not wish to give them a single shell from his property." The will then provides that the defendants, the testator's nephew (sister's son) Cheda Lal, and Joti Prasad, son of Ganesh Prasad, Brahman, who were fond of him and with whom he was pleased, should after his death have all his funeral ceremonies performed with "my money and also with money due to me under bonds which may be realized, and after my funeral ceremonies they should also have my *barsi* and *chaubarsi* performed." Then follows a direction that "if any money is left after the performance of the above-mentioned ceremonies it must be laid out on some religious purpose or in building a *thakurdwara* (temple) by which the testator's soul may be benefited and which was proper according to Hindu law." Then there is the following direction:—"But my nephews aforesaid (brother's sons) neither have nor shall have any right whatever in my before-mentioned property," which reiterates the determination of the testator to exclude these nephews from participating in his estate. Possession of all the movable property of the deceased was made over by the Collector to the defendants as the parties entitled to it under the will which was found amongst the testator's papers. The plaintiff, though he alleged that the will was a fabricated document in the Court below, before us on appeal does not dispute its validity, but he alleges that under the terms of the will only money in the restricted signification of the word passed to the defendants, and he claims the rest of the deceased's property consisting of articles of silver and gold, brass and other metals, wearing apparel, etc., as his heir. The testator appears to have considered that the plaintiff's sons would inherit his property under Hindu law. He may have thought that his brother would predecease him. On the part of the defendants the contention is that the will was a disposition of the entire property of the deceased and that they are universal legatees of it upon the trusts mentioned in the document. There is no doubt that in the absence of explanatory context a word such as "money" should be construed in its strict sense; but terms which in their strict and proper signification apply to a particular species of property, as in this case *rupia*, have been held to embrace the general personal estate of a testator.

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The word money, the equivalent of *rupia* (rupees), is often used in a vague sense as denoting a man's personal or movable property, and it has been so interpreted in several cases. This has been done in cases where a testator has shown a clear intention to make a complete disposition of his property, an intention which could only be carried out by giving a wide interpretation to the word money. We have been referred to an authority which illustrates this, namely, the case of *Cadogan* v. *Palagi* (1). In that case the testatrix, who was possessed of cash securities, leaseholds, furniture and effects, by her will, gave one-half of the money of which she was possessed to her sister Honoria Frances Cadogan, and directed that the remainder should be divided equally between certain other sisters and after them their children. It was held that in construing a will no absolute technical meaning should be given to such a word as money, the meaning of which must depend upon the context, if any, which can explain it, and upon such surrounding circumstances as the Court can take into consideration in determining the construction. It was held in that case that the word *money* passed all the personal estate. Now if anything is clear upon the will before us it is that the testator did not intend to die intestate as to any portion of his property. It is to be observed that the Court always leans against so construing a will as to make a testator die partially intestate. This is what we are asked to do in this case. In the opening words of the will the testator declares that he "excludes his nephews (brother's sons) from inheriting his estate." The word which is translated estate is the word *turka, i.e.,* what is left behind, and that he does not wish to give them a single shell from his "property," the word used for property being *jaidad*. Then follows the direction in favour of the two defendants, and in this, the operative part of the will, he directs that they shall perform his funeral ceremonies with his (the testator's) money, and also with the money due to him under bonds, etc. At the end of the will details of the bonds and decrees outstanding in his favour are given. Now it appears to us that when he used the words "my money" coupled with the words "also money due to me" he meant by the words "my money" something outside and other

(1) (1883) L. R., 25 Ch. D., 154.

than the money due to him upon the bonds and decrees stated in the details contained in the will. What was that money? Undoubtedly, as we have said, he did not intend to die partially intestate, and it appears to us that when he used the words "my money" he intended that that word *rupia* (money) should be synonymous with the words *turka* and *jaidad* which he used in the earlier part of the will, and so dispose of by his will whatever he should leave behind him. In the last direction in the will that his nephews should have no right whatever in his property before mentioned, the testator emphasizes his determination to make a complete disposition. We cannot disregard the very clear intention of the testator to dispose of all his property which appears upon the face of this document. For these reasons we think that the learned Subordinate Judge was entirely in error in the construction which he placed upon the will, and that the defendants are entitled to hold all the testator's property upon the trusts and for the purposes declared by the will. We are not asked to state whether the dispositions of the will in favour of religious purposes or for the building of a *thakurdwara* are valid or not. This is a matter which may have to be determined, but with which we have nothing to do in the present appeal; all that we say is that, having regard to the provisions of the will, the plaintiff is not entitled to dispossess the defendants of the testator's property. We therefore allow the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit. As to costs, if the plaintiff had instituted his suit for the purposes of determining the true construction of the will, we should have been disposed to allow him his costs in both Courts out of the estate, because no doubt upon the terms of this will there is a fair question for argument, but inasmuch as he impeached the will in the Court below and alleged that it was a fabricated document, we cannot see our way to allow him costs in the Court below, but we shall allow him his costs of this appeal to be paid out of the estate. The defendants will be entitled to the costs of defending the suit in the Court below and also of this appeal out of the estate.

Appeal decreed.

1908.
May 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM RATAN (DEFENDANT) *v.* LACHMAN DAS, (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of other members of family for managing member's debts.

R. R., a member with *G. L.*, his uncle, of a joint Hindu family, got a decree for costs against *G. L.*, and had him arrested in execution thereof. *G. L.*, thereupon borrowed money on a mortgage of joint family property and procured his release. *Held* on suit by the mortgagee for sale of the mortgaged property that the mortgagee could not under the circumstances proceed against *R. R.'s* interest in the joint family property. *Dalip Singh* v. *Sri Kishen Pande* (1) distinguished.

THIS was a suit on a mortgage bond of the 31st of August 1902, executed by one Gendan Lal, who is said to have been the manager of a joint Hindu family, of which Ram Ratan, his nephew, and several others were members. Ram Ratan brought a suit against his uncle, Gendan Lal, and obtained a decree, and in order to provide money for the satisfaction of this decree, in connection with which Gendan Lal was imprisoned, Gendan Lal, purporting to act as manager of the joint family, executed the mortgage in suit. The Court of first instance (Munsif of Moradabad) decreed the plaintiff's claim, and this decree was affirmed by the Additional Judge. Ram Ratan appealed to the High Court, on the ground that he, though a member of the joint family at the time when the bond was executed, was in no way liable to pay Gendan Lal's debt, which was owing to himself, and that his share in the joint family property is not liable to be sold in execution of a decree on the mortgage executed by Gendan Lal.

Munshi *Gokul Prasad* and Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This was a suit on a mortgage bond of the 31st August 1902, executed by one Gendan Lal, who is said to have been the manager of a joint Hindu family, of which Ram Ratan, his nephew, and several others were members. It appears that Ram Ratan brought a suit against his uncle,

*Second Appeal No. 710 of 1907 from a decree of W. F. Kirton, Additional District Judge of Moradabad, dated the 9th of March 1907, confirming a decree of Abdul Ali, Munsif of Moradabad, dated the 11th of December 1906.

(1) N.-W. P., H. C. Rep., 1872, p. 83.

than the money due to him upon the bonds and decrees stated in the details contained in the will. What was that money? Undoubtedly, as we have said, he did not intend to die partially intestate, and it appears to us that when he used the words "my money" he intended that that word *rupia* (money) should be synonymous with the words *turka* and *jaidad* which he used in the earlier part of the will, and so dispose of by his will whatever he should leave behind him. In the last direction in the will that his nephews should have no right whatever in his property before mentioned, the testator emphasizes his determination to make a complete disposition. We cannot disregard the very clear intention of the testator to dispose of all his property which appears upon the face of this document. For these reasons we think that the learned Subordinate Judge was entirely in error in the construction which he placed upon the will, and that the defendants are entitled to hold all the testator's property upon the trusts and for the purposes declared by the will. We are not asked to state whether the dispositions of the will in favour of religious purposes or for the building of a *thakurdwara* are valid or not. This is a matter which may have to be determined, but with which we have nothing to do in the present appeal; all that we say is that, having regard to the provisions of the will, the plaintiff is not entitled to dispossess the defendants of the testator's property. We therefore allow the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit. As to costs, if the plaintiff had instituted his suit for the purposes of determining the true construction of the will, we should have been disposed to allow him his costs in both Courts out of the estate, because no doubt upon the terms of this will there is a fair question for argument, but inasmuch as he impeached the will in the Court below and alleged that it was a fabricated document, we cannot see our way to allow him costs in the Court below, but we shall allow him his costs of this appeal to be paid out of the estate. The defendants will be entitled to the costs of defending the suit in the Court below and also of this appeal out of the estate.

Appeal decreed.

Gendan Lal, and obtained a decree, and in order to provide money for the satisfaction of this decree, in connection with which Gendan Lal was imprisoned, Gendan Lal, purporting to act as manager of the joint family, executed the mortgage in suit. The Court of first instance decreed the plaintiff's claim, and this decree was affirmed by the lower appellate Court. Ram Ratan now appeals to this Court, and his case is that he, though a member of the joint family at the time when the bond was executed, was in no way liable to pay Gendan Lal's debt, which was owing to himself, and that his share in the joint family property is not liable to be sold in execution of a decree on the mortgage. The learned Additional Judge in his judgment was of opinion that the raising of the loan by Gendan Lal was a matter of necessity, and that, in view of the decision in *Dalip Singh* v. *Sri Kishen Pande* (1) the plaintiff was entitled to maintain his decree. That case decided that ancestral property may be sold by a father to effect his release from prison. Now there is no doubt that Hindu sons are liable for their father's debts, and that the sons in such a case are bound to satisfy the debts, and, if necessary, by payment of the father's debts, release him from custody. But this is an entirely different case. The appellant Ram Ratan was under no liability to pay Gendan Lal's debt—a debt which, as we have said, was due to himself. Therefore there is no analogy between this case and the case on which the learned Additional Judge rested his decision. We think that his decision is wrong and that the appeal must be allowed so far as Ram Ratan is concerned. The other defendants to the suit have not resisted the decree, and therefore it will hold good as to them. As regards Ram Ratan the suit must be dismissed as against him. We accordingly allow the appeal. We set aside the decree passed against Ram Ratan, and dismiss it as against him and as against his share of the mortgaged property, with costs in all Courts.

Appeal decreed.

(1) N.-W. P., H. C. Rep., 1870, p. 83.

1908
May 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

UMMI BEGAM (PLAINTIFF) *v.* KESHO DAS (DEFENDANT). *

Lunatic Muhammadan law—Guardian de facto—Sale of lunatic's property by mother and wife for benefit of lunatic.

The mother and wife of a lunatic Muhammadan, acting *de facto* as the guardians of the lunatic, sold certain property belonging to the lunatic in order to discharge debts due by him. *Held* that the transaction could not be impeached, although the mother was not under the Muhammadan law the legal guardian of the lunatic. *Mafazzal Hosain* v. *Basid Sheikh* (1), *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (2) and *Majidan* v. *Ram Narain* (3) followed.

THE plaintiff in this case sued as daughter and heiress of one Mahmud Husain, who was a lunatic, to recover possession of her share in a certain plot of land. The land in suit had been sold on the 22nd of June 1867 by the wife and mother of the lunatic acting as guardians on his behalf, and the purchaser on the 19th of May 1877, sold it to the father of the defendant in the present suit. The second purchaser built a house on the land, said to have been of considerable value. The lower appellate Court (Additional District Judge of Moradabad) found that the sale had been effected by the wife and mother of the lunatic as his *de facto* guardians, and that the sale was for his benefit, debts due by him having been paid off out of the proceeds thereof. That Court accordingly dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Muhammad Ishaq Khan* and Babu *Jogindro Nath Mukerji*, for the appellant.

Mr. *M. L. Agarwala* and Dr. *Satish Chandra Banerji*, for the respondent.

STANLEY, C.J., and BANERJI, J.—The appellant is the daughter of one Mahmud Husain, who was a lunatic. She brought the suit out of which this appeal has arisen for possession of her share of the site of a house now in the possession of the defendant. Mahmud Husain, as we have said above, was a lunatic. On the 22nd of June 1867 his wife and mother executed a sale deed in respect of the land now in suit. The purchaser under

* Second Appeal No. 790 of 1907, from a decree of A. Kendall, Additional District Judge of Meerut, dated the 6th of April 1907, reversing a decree of H. David, Subordinate Judge of Meerut, dated the 4th of December 1906.

(1) (1906) I. L. R., 34 Calc., 36. (2) (1906) I. L. R., 34 Calc., 65.
(3) (1903) I. L. R., 26 All., 22.

that sale sold his rights to the defendant's father on the 19th of May 1877. After his purchase a house was built by the purchaser on the land, and it is alleged that the house is of considerable value. The present suit was brought by the plaintiff on the last day of the expiry of limitation calculated from the date of the lunatic's death. The Court below has found that the sale was effected by the mother and wife of the lunatic as his *de facto* guardians, and that the sale was for the benefit of the lunatic, debts due by him having been discharged with the proceeds of the sale. It is contended that the mother and the wife were not the legal guardians of the lunatic under the Muhammadan law, and it is urged that they had no power to sell the lunatic's property. It is true that under the Muhammadan law a mother is not the legal guardian of the property of her minor son, but it has been held that when she, acting as *de facto* guardian, deals with the property, the transaction, if it is for the benefit of the minor, ought to stand. We may refer to the rulings of the Calcutta High Court in *Mafazzal Hosain* v. *Basid Sheikh* (1) and *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (2) and to the ruling of this Court in *Majidan* v. *Ram Narain* (3). In our judgment the decision of the Court below is right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1906) I. L. R., 34 Calc., 36. (2) (1906) I. L. R., 34 Calc., 65.
(3) (1903) I. L. R., 26 All., 22.

1908
May 16

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GENDO (DEFENDANT) *v.* NIHAL KUNWAR (PLAINTIFF).*

Civil Procedure Code, sections 244, 258—*Execution of decree—Uncertified payment out of court—Subsequent execution by decree-holder—Suit to recover sum paid out of court.*

A judgment-debtor made a part payment of what was due under the decree against him to the decree-holder, but such payment was not certified in the manner required by section 258 of the Code of Civil Procedure, and the decree-holder in consequence was able to take out execution and get the amount paid twice over. *Held* that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by section 244 or by section 258 of the Code. *Shadi* v. *Ganga Sahai* (1) and *Periatambi Udayan* v. *Vellaya Goundan* (2) followed.

THE facts of this case are as follows:—

On the 18th of February 1902, Ram Prasad and Tulshi Ram the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present, suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs. 2,875. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders, on the 19th May 1903, obtained an order absolute under section 89. Ram Prasad and Tulshi Ram are dead, and the defendant is their heir. On the 26th of February 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections,

* Second Appeal No. 383 of 1907, from a decree of A. Kendall, Additional District Judge of Meerut, dated the 8th of March 1907, reversing a decree of Banke Behari Lal, Munsif of Meerut, dated the 31st of May 1906.

(1) (1881) I. L. R. 3 All., 538. (2) (1897) I. L. R., 21 Mad., 409.

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alleging that she had paid the anount due, and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure, and on the ground that her application was beyond time. Thereupon the present suit was instituted for the recovery of the sum of Rs. 634-7, paid as above described. The suit was dismissed by the Court of first instance (Munsif of Meerut), but this decision was reversed, and the suit decreed by the Additional District Judge. The defendant appealed to the High Court.

Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *M. L. Agarwala* and Lala *Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI.—This was a suit for the recovery of a sum of Rs. 634-7-0 and interest, which is alleged to have been paid by the plaintiff to the ancestors of the defendant in satisfaction of the balance due on a decree held by them, and which was not so applied. The facts leading up to it are these. On the 18th of February 1902, Ram Prasad and Tulshi Ram, the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs 2,375. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders on the 19th May 1903 obtained

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an order absolute under section 89. Ram Prasad and Tulshi Ram are dead, and the defendant is their heir. On the 26th of February 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections, alleging that she had paid the amount due, and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure, and on the ground that her application was beyond time. Thereupon the present suit was instituted. It is stated, and it is not denied, that the property of the plaintiff has been sold in execution of the decree and the entire amount payable to the defendant has been realized by the sale. The question then is whether or not the plaintiff has any remedy in respect of the sum of Rs. 634-7-0, which was paid to Ram Prasad and Tulshi Ram for the purpose of satisfying the balance due at the time, or must submit to the payment of this amount twice over. We think that the lower appellate Court rightly decided that neither section 244 nor section 258 of the Code precludes the institution of a suit such as this, and we are supported in this view by several authorities. One is a case in this Court—*Shadi* v. *Ganga Sahai* (1), which is on all fours with the case before us. Another is the case of *Periatambi Udayan* v. *Vellaya Goundan* (2). The same point was decided similarly in this case. We agree with those decisions and dismiss this appeal with costs.

Appeal dismissed.

(1) (1881) I. L. R., 3 All., 258. (2) (1897) I. L. R., 21 Mad., 409.

1908
May 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GHASITEY (DEFENDANT) *v.* GOBIND DAS (PLAINTIFF) AND BAIJ NATH AND ANOTHER (DEFENDANTS).*

Pre-emption—Re-sale to a co-sharer after institution of a suit for pre-emption—Act No. IV of 1882 *(Transfer of Property Act), section* 52—*Lis pendens.*

After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. *Held* that the doctrine of *lis pendens* applied, and the plaintiff was entitled to a decree. *Faiyaz Husain Khan* v. *Prag Narain* (1) referred to. *Manpal* v. *Sahib Ram*(2) distinguished.

THE facts out of which this appeal arose are as follows :—

ONE Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co-sharer of equal degree with the plaintiff in the village. Ghasitey was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. It was not disputed that the plaintiff had no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff which found favour with the Court below was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption.

The claim was decreed by the Court of first instance (Munsif of Banda) and the decree of that Court was affirmed by the lower appellate Court (District Judge of Banda.) The defendant Ghasitey appealed to the High Court.

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* Second Appeal No. 224 of 1907, from a decree of L. Marshall, District Judge of Banda, dated the 21st of December 1906, confirming a decree of Syed Hamid Husain, Munsif of Banda, dated the 8th of November 1906.

(1) (1907) I. L. R., 29 All., 339. (2) (1905) I. L. R., 27 All., 544.

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GHASITEY v. GOBIND DAS.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Mr. *Muhammad Raoof*, for the respondent Gobind Das.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit for pre-emption brought under the following circumstances. One Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co sharer of equal degree with the plaintiff in the village. It is not disputed that the plaintiff has no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff, which found favour with the Court below, was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption. Ghasitey, we may mention, was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. The claim was decreed by the Court of first instance and the decree of that Court was affirmed by the lower appellate Court.

It is urged before us that the rule of *lis pendens* cannot apply to the present case, and that as the right of Ghasitey was not inferior to that of the plaintiff, the suit ought to have been dismissed. In our judgment this contention is not well founded. It has been held by the Privy Council in the recent case of *Faiyaz Husain Khan* v. *Prag Narain* (1) that where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a contentious one within the meaning of section 52 of the Transfer of Property Act and render the doctrine of *lis pendens* applicable. The fact therefore of the purchase by Ghasitey having been made before the service of summons does not make section 52 of the Transfer of Property Act inapplicable. That

(1) (1907) I. L. R., 29 All., 339.

section provides that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which might be made therein. Had the sale in favour of Ghasitey not been affected, the plaintiff would have got a decree for pre-emption as against the original vendee, Baijnath. As the purchase by Ghasitey was made after the institution of the plaintiff's suit, this purchase cannot, having regard to the provisions of section 52, affect the right of the plaintiff under the decree obtained in the suit. Had the sale been made before the institution of the suit, the result would have been different, because at the date of the institution of the suit the plaintiff would have had no right preferential to that of the purchaser then holding the property. When however after the institution of the suit for pre-emption a sale is made that sale cannot affect the right of the plaintiff to the decree obtained in the suit, as the purchaser took the property subject to the result of the suit. The case of *Manpal* v. *Sahib Ram* (1), referred to by the learned vakil for the appellant, is distinguishable. There the plaintiff amended his plaint, made the second purchaser of the property a defendant to the suit, and raised the issue of his title to pre-empt as against that purchaser. It was held that after having gone to trial upon that issue, he could not take shelter under the provisions of section 52. That is not the case here. In the present suit the sale was made, as we have said above, some days after the institution of the suit. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) I. L. R., 27 All., 544.

1908
May 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

DWARKA DAS AND ANOTHER (PLAINTIFFS). *v.* AKHAY SINGH (DEFENDANT) *

Civil Procedure Code, section 13—*Res judicata*—*Question of right to receive a recurring payment*—*Civil and Revenue Courts*—*Revenue Court deciding a question of title.*

The plaintiffs sued to recover their share of an annuity chargeable on a 7½ biswa share of a certain village for the years 1309, 1310 and 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 and 1308, the plaintiff's right to receive the annuity had been admitted by the defendant, and a decree passed accordingly which had been affirmed by the High Court.

Held that the fact that the two suits related to different years did not prevent the judgment in the former operating as *res judicata* in the latter. *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (1) followed. Neither did the fact that the first decision was that of a Court of Revenue make any difference. Either the suit was wrongly brought in a Revenue Court, a defect which was cured by its coming to a Civil Court in appeal; or the Revenue Court deciding a question of title might be regarded *quoad hoc* as a Civil Court. *Salig Dube* v. *Deoki Dube* (2) referred to.

THE facts of this case as found by the lower appellate Court are as follows:—In 1862 there was some litigation between one William Derridon and his two sisters Rosina and Teresa. Under a compromise decree, dated the 11th of September 1862, the two sisters were given an annuity of Rs. 360, and it was made a charge on 7½ biswas muafi rights in mauza Anwalkhera. The compromise decree provided that the two ladies were to enjoy the annuity for their lives; that after their death it was to devolve on their issue; that the ladies and their heirs had no right to transfer the annuity charge; that the annuity charge was to revert to Major Derridon (father of William) and his heirs on the death of the two ladies without issue. The ladies died without issue and the annuity charged reverted to George Derridon (a nephew of William) and he became the absolute owner of the charge. The father of the plaintiffs purchased half the share in the charge from George Derridon, and he acquired the right to realize the charge from 7½ biswas muafi. William Derridon had transferred 1 biswa and 16 biswansis out of the

* Second Appeal No. 88 of 1907, from a decree of Sheo Prasad, Additional Subordinate Judge of Agra, dated the 23rd of October 1906, confirming a decree of Baidya Nath Das, Munsif of Agra, dated the 21st of December 1905.

(1) (1901) I. L. R., 24 All., 112. (2) Weekly Notes, 1907, p. 1.

7½ biswas to the father of the plaintiffs and the remaining 5 biswas and 14 biswansis muafi were purchased at auction sale by the defendants 2nd set. The plaintiffs' father thus became the owner of the charge on 7½ biswas muafi and of 1 biswa and 16 biswansis muafi itself. The proportionate charge on 1 biswa and 16 biswansis muafi became merged in it and he transferred the said full and absolute muafi to the defendants 1st set.

In 1897, the plaintiffs brought a suit for recovery of their share of the charge for certain years against the defendant Raja Akhay Singh. The suit was decreed on the admission of the defendant. The present suit was for the recovery of instalments of the same charge for other years. The Court of first instance (Munsif of Agra) dismissed the suit and this decision was on appeal confirmed by the Additional Subordinate Judge. The plaintiffs appealed to the High Court.

Mr. *A. E. Ryves*, Dr. *Satish Chandra Banerji* and Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Durga Charan Banerji*, for the respondent.

KARAMAT HUSAIN, J.—The facts which have given rise to this appeal are as follows:—

The plaintiffs brought a suit for their share, amounting to Rs. 151-8-0, in an annuity which was a charge on a 7½ biswa share in the village Anwalkhera for the years 1309, 1310 and 1311 Fasli. The defendants resisted the claim on various grounds. The learned Munsif dismissed the suit. He held that the judgment of this Court, dated the 14th August 1905, did not operate as *res judicata*, inasmuch as the subject-matter in issue in the case in which that judgment was pronounced was not the same as in the present case. He remarks:—"I do not think (that) that judgment can operate as *res judicata*, the subject-matter being different, *viz.* for a different year's charge."

The plaintiffs appealed to the District Judge. Their fifth ground of appeal was that "the question of the liability of the defendant No. 1 to pay the plaintiffs is *res judicata*."

The learned District Judge dismissed the appeal on the ground that the defendant No. 1 was not liable to pay the annuity to the plaintiffs, without deciding the plea of *res judicata*. I may mention here that the former suit was instituted in the Revenue

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Court, and that no objection was taken that the suit was instituted in the wrong Court. The learned District Judge under the provisions of section 206 of the North-Western Provinces Rent Act (Act No. XII of 1881) disposed of the appeal as if the suit had been instituted in the right Court. He remarked :—

"It is a mere quibble to say that (the) defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Raja Govind Singh admitted his liability to pay it and offered to pay it. Now that the case has come to this Court, it is immaterial whether the suit was originally instituted in the Civil Court or the Revenue Court. The only objection that Raja Govind Singh's pleader can now raise as to paying it is that if the suit was brought in the Civil Court for the money as an annuity, his client might be able to raise some defence. But the facts have been before him for a long time, and if there is any reason why he should not pay the money, he should be able to state it in this Court. On the state of things at present disclosed the appellants are clearly entitled to receive the money."

The plaintiffs have preferred a second appeal to this Court. It is contended on their behalf that the question of the liability of the defendant No. 1 to pay Rs. 151-8-0 to the plaintiff is *res judicata* by reason of the judgment of the High Court between the same parties, dated the 14th August 1905, in Second Appeal No. 872 of 1903, and that the fact that the claim in the former litigation was for a different set of years cannot prevent the operation of *res judicata*, for the title under which the plaintiffs claimed the share of the annuity, whether for one set of years or another, was one and the same title in both cases.

To meet this contention, it is argued for the respondent (1) that the claim in the former suit was for 1306, 1307 and 1308 Fasli, while in the present suit it was for 1309-11 Fasli, and thus the subject-matter was not identical in both suits; (2) that the question of title was not determined in the former litigation; (3) that the former suit was instituted in the Revenue Court, while the present suit was brought in the Civil Court; (4) that the decision of the question of liability by the Revenue Court could not operate as *res judicata* in the present suit, which was brought in the Civil Court, and in which the question of

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liability to pay the share of the annuity was in issue. See *Rani Kishori* v. *Raja Ram* (1), *Ashraf-un-nissa* v. *Ali Ahmad* (2), and *Inayat Ali Khan* v. *Murad Ali Khan* (3); and (5) that the ultimate decision of the appeal in the former suit by the High Court was immaterial, inasmuch as, for the operation of the plea of *res judicata*, the competency of the original Court which decided the former suit must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal. (See *Shebu Raut* v. *Behari Raut*, (4).

In order to see whether the question of title was raised in the former litigation, I examined the paper book of S. A. No. 872 of 1903, with the following result:—

The plaintiffs in their plaint alleged that "the plaintiffs' share amounted to Rs. 214-14-11 per annum." The defendants in their written statement admitted that "according to the village practice the plaintiffs had always been getting Rs. 151-8-0 per annum on account of the revenue of their share." They further added that the defendants always offered to pay Rs. 151-8-0, and that that sum might be awarded to the plaintiffs. The issue ran as follows:—"Whether the annual amount of revenue was Rs. 214-14-11, as claimed by the plaintiffs, or Rs. 151-8-0 as alleged by the defendants."

The first Court dismissed the claim, considering it a claim for revenue. The plaintiffs appealed to the learned District Judge, who decreed the appeal. His remarks are:—

"Now as to whether the appellants are entitled to the amount admitted in the written statement, the pleader for Raja Govind Singh contends that the written statement was a piece of foolishness on the part of the defendant's karinda, that the defendants never admitted that the plaintiff was entitled to a share of an annuity, and that the admission gives the plaintiff no title. Now formal pleas in a written statement cannot be evaded by saying that they were foolishly made by an agent. The defendant admitted that the plaintiff was entitled to receive from him annually Rs. 151-8-0 out of the assigned revenue of the share in question.

(1) (1903) I. L. R., 26 All., 468.
(2) (1904) I. L. R. 26 All., 601.
(3) (1905) I. L. R., 27 All., 569.
(4) (1908) 7 C. L. J. R., 470.

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"Although that amount has been fixed by the decision of the Court, and cannot fluctuate according to fluctuation in the revenue of the share, yet plaintiff's title is undoubtedly based on the fact that his predecessors in title had a share in the estate. The sum in question has always hitherto been dealt with by the Revenue Court, and it is a mere quibble to say that defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Govind Singh admitted his liability to pay it and offered to pay it."

The defendants, Raja Govind Singh and Kunwar Akhay Singh, appealed to this Court, and a Bench of this Court, of which one of us was a member, dismissed the appeal on the 14th of August 1905, with the following remarks:—"It is clear on the findings that this appeal cannot be supported. The defendant appellant admitted his liability to pay Rs. 151-8-0. The District Judge gave a decree in accordance with that admission, and so acted within his right."

The above passages leave no doubt in my mind that in the previous litigation, the question of title was involved, and the liability of the defendant No. 1 to pay Rs. 151-8-0 a year to the plaintiffs was decided on his own admission. Such being the case, the judgment of this Court, dated the 14th August 1905, undoubtedly operates as *res judicata*, notwithstanding the fact that the claim in the present litigation is for a different set of years.

Chandi Prasad v. *Maharaja Mahendra Mahendra Singh*, (1) is an authority for the above proposition. The root of the matter between the parties, whether it related to 1306, 1307 and 1308 fasli, or to 1309, 1310 and 1311 Fasli, was in both cases the same, and the liability of the defendant to pay to the plaintiffs the share of the annuity amounting to Rs. 151-8-0 was decided in the former suit.

It is, however, argued for the respondent that the original Court which determined the question of the liability of the defendant to pay Rs. 151-8-0 annually was the Revenue Court, and its decision cannot operate as *res judicata* in the present suit instituted in the Civil Court.

(1) (1901) I. L. R., 24 All., 112.

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There is no force in the argument. The former suit was no doubt instituted in the Revenue Court, which was the wrong Court, but no objection was taken to such institution, and the learned District Judge proceeded under section 206 of the North-Western Provinces Rent Act, which runs as follows:—

"In all suits instituted in any Civil or Revenue Court in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the Appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court."

He disposed of the appeal as if the suit had been instituted in the right Court. Under such circumstances, the Revenue Court must be deemed to be the Civil Court, and the decision of the Revenne Court on the question of title must be held to be the decision of the Civil Court. Apart from the provisions of section 206 of the North-Western Provinces Rent Act (XII of 1881), whenever a Revenue Court has the power of directly deciding a question of title that Court for deciding that question must on principle be deemed to be a Civil Court. The determination of the question of title is the function of a Civil Court, and if the Legislature invests a Revenue Court with the power of directly deciding the question of title in certain cases, the Revenue Court in those cases becomes a Civil Court. The case of *Salig Dube* v. *Deoki Dube* (1) which lays down that when a Revenue Court, under section 199 of the Agra Tenancy Act, decides a question of title against a tenant is barred by the rule of *res judicata*, from reopening the question of title in a Civil Court, is, I think, based on that principle.

The cases of *Rani Kishori* v. *Raja Ram* (2), *Ashraf-un-nissa* v. *Ali Ahmad* (3) and *Inayat Ali Khan* v. *Murad Ali Khan* (4) have no application to the facts of the present case. In those cases the Revenue Court, under section 206 of the N.-W. P. Rent Act (XII of 1881), was not transformed into a Civil Court, nor was it invested with the power of directly deciding the

(1) Weekly Notes, 1907, p. 1.
(2) (1903) I. L. R., 26 All., 468
(3) (1904) I. L. R., 26 All., 601.
(4) (1905) I. L. R., 27 All., 569.

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question of title. Moreover, the question of title was not directly in issue in the Revenue Court in those cases. Regarding the case of *Shebu Raut* v. *Behari Raut*, it is sufficient to remark that it lays down a correct rule of law, but has no application to the case before us, in which the original Court of Revenue, by the provisions of section 206 of the old Rent Act, is deemed to be a Civil Court.

For the above reasons, I would hold that the judgment of this Court, dated the 14th August 1905, in S. A. No. 872 of 1903, operates as *res judicata*, and would allow the appeal and set aside the decrees of the Courts below and decree the plaintiff's claim with costs.

STANLEY, C. J.—I concur in the proposed order.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the Courts below be set aside, and the plaintiffs' claim be decreed with costs.

Appeal decreed.

1908
June 13.

Before Mr. Justice Banerji and Mr. Justice Richards.

BITHAL DAS AND OTHERS (DECREE-HOLDERS) *v* JAMNA PRASAD AND OTHERS, (JUDGMENT-DEBTORS) *

Execution of decree—Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.

On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

Held (1) that the plaintiffs were at liberty to proceed either by application or by suit—*Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), *Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) referred to; and (2) that the application was

*First Appeal No. 45 of 1908, from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 29th of January 1908.

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R., 28 All., 665.
(3) (1906) I. L. R., 29 All., 143.

not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das* (1) distinguished.

THE facts of this case are as follows :—

On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904; the suit was retried; and on the 17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court together with interest and costs. The Court below (Subordinate Judge of Agra) granted the application.

The decree-holders thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Babu *Sital Prasad Ghose*, for the respondents.

BANERJI and RICHARDS, JJ.—The facts out of which this appeal arises are these :—On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904. The suit was retried; and on the

(1) (1900) I. L. R., 28 Calc., 113.

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17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court, together with interest and costs. The Court below has granted the application. Hence this appeal.

Two contentions have been urged before us—(1) that the remedy of the respondent was a suit and not an application, and (2) that the application is time-barred.

As regards the first point we think that the respondents were competent to make an application for the refund of the money. The decree originally passed was superseded by the subsequent decree made in 1904. As observed by their Lordships of the Privy Council in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), "if it (the decree) has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and as their Lordships conceive, is recoverable either by summary process or by a new suit or action." The respondents were therefore entitled to apply for a refund of the money and were not bound to bring a separate suit. That they are entitled to the money can admit of no doubt, and the only question is as to the form of the remedy to which they must resort for obtaining relief. The principle of the rulings of this Court in the cases of *The Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) applies to this case.

As to the question of limitation, the respondents did not become entitled to the money until the decree of the 17th of September 1904 was passed. It is true that on the *ex parte* decree passed on the 7th of October 1901 being set aside they might have applied to the Court to direct the appellants to refund the sum of Rs. 19,041 which they had withdrawn from the Court in pursuance of that decree, but as an injunction had been issued restraining them from withdrawing the money until the final

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R. 28 All., 665.
(3) (1906) I. L. R. 29 All., 143.

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decision of the suit they could not apply for payment of the amount to them either by the Court or by the appellants. This distinguishes the present case from the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1). Upon the *ex parte* decree being set aside the parties were relegated to the position in which they were before the decree was made. Therefore the injunction which had been issued to the respondents under section 492 revived and remained in full force, and the respondents could not have asked for payment of the money. As we have said above, it was only when the suit was finally decided and the decree was made for a smaller sum than that which the appellants had taken from the Court that the respondents' right to a refund accrued. As their application for a refund was made within three years of that date, the application is not time-barred. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908 *June* 20.

UMAN KUNWARI (DEFENDANT) *v.* JARBANDHAN (PLAINTIFF) AND RAM RAJI KUNWARI (DEFENDANT).*

Civil Procedure Code, sections 562, 588 (28)—*Remand—Appeal from order of remand filed after decision of suit in accordance therewith.*

Held that the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. *Babu Lal* v. *Ram Kali* (2) followed. *Salig Ram* v. *Brij Bilas* (3) overruled. *Rameshur Singh* v. *Sheo Din Singh* (4), *Sheo Nath Singh* v. *Ram Din Singh* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6) referred to. *Madhu Sudan Sen* v. *Kamini Kanta Sen* (7) dissented from.

THIS was an appeal in a pre-emption suit. The court of first instance (Munsif of Basti) dismissed the suit on the 30th of April 1906, but the lower appellate court (officiating Subordinate Judge of Gorakhpur) reversed this decision, and, on the 27th

* First Appeal No. 69 of 1907, from an order of Banke Bihari Lal, Subordinate Judge of Gorakhpur, dated the 27th of March 1907.

(1) (1900) I. L. R., 28 Calc., 113.
(2) Weekly Notes, 1906, p. 28.
(3) (1907) I. L. R., 29 All., 659.
(4) (1889) I. L. R., 12 All., 510.
(5) (1895) I. L. R., 18 All., 19.
(6) (1885) I. L. R., 12 Calc., 45.
(7) (1905) I. L. R., 32 Calc., 1023.